Sentencing Within Sentencing

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When a judge sentences a convicted defendant, he or she takes into account many factors and tries to achieve one or more of the oft-cited purposes of punishment: incapacitation (to protect the public from further crimes committed by the defendant), deterrence, restitution, retribution, and rehabilitation. The federal sentencing statute instructs the court not to impose a sentence greater than necessary to accomplish the goals the sentence is crafted to achieve. Indeed, in most states, the imposition of a sentence is a regulated process: Statutes tell judges what they can consider when deciding the sentence, guidelines or statutes inform judges of the boundaries of the sentence (e.g., custodial versus noncustodial and length of term), and—in all cases—sentence severity is reviewable by a higher court, to ensure that a judge does not impose a penalty that is more than necessary to achieve the accepted goals.

What the statutes, guidelines, case law, or even the defense attorney don’t mention, however, is that a criminal sentence imposed after a conviction does not fully define the punishment meted out to a defendant. People involved in the criminal justice system are, in fact, punished at multiple points.

For example, upon arrest, a person may be held in jail pending charges; at arraignment, he or she may be held further for inability to post bail or make bond; while incarcerated, bad behavior may be met with isolation from other prisoners; on probation, conditions may be imposed that most people would find difficult to comply with; upon release from prison, he or she may be subject to further strict supervision, burdened with thousands of dollars in debt, and barred from employment, housing, and welfare benefits. Such people can receive a number of different punishments—de facto sentences—at different points throughout their journey in the criminal justice system.

The Vera Institute of Justice has long worked with leaders in government and civil society to improve the systems people rely on for justice and safety. In particular, since its inception Vera has sought to examine how sentences and other punishments either serve or fail to meet the ends of justice and how they further, or frustrate, the sensible operation of the government structures in which they occur.

Vera has a history of examining the traditional sentencing decision—as the publisher of Federal Sentencing Reporter, as a partner to states and localities seeking to improve their sentencing frameworks, as a researcher of crime and punishment, and as the author of examinations and analyses of the trends, policies, and practices of sentencing.

This issue of FSR, published as Vera celebrates its fiftieth year of working to promote justice, is devoted to illustrating the many other ways, in addition to the actual sentencing decision imposed by a judge, that people are punished by de facto sentences in the criminal justice system. This story is told through different perspectives offered by the Institute’s varied work and draws on both historical and recent reports, as well as original articles describing current projects.

Vera’s work has been remarkably consistent over the past five decades in terms of both process and substance—perhaps proving the old proverb that the more things change, the more they stay the same.

In terms of process, there may be no better way to improve the criminal justice system than by identifying a problem, developing a solution, and implementing a response. Vera has followed this straightforward approach from its beginning, also insisting throughout on evaluation and testing to ensure that responses actually address problems as intended. This model remains the core of Vera’s work today—in demonstration projects designed to test direct-service innovations, in technical assistance that provides counsel to government officials, in research projects, and in publications. Vera founder Herb Sturz described this model in “Experiments in the Criminal Justice System,” an article
originally published in 1967 based largely on his testimony to Congress the previous year. It provides a still-applicable introduction to this issue and to Vera’s modus operandi.

In terms of substance, many of the solutions Vera identified in the 1960s, 1970s, and 1980s remain more relevant today than ever before. The pretrial services model launched in 1961 as the Manhattan Bail Project continues to influence the evolving field of pretrial decision-making and services, and it remains the template to which other jurisdictions gravitate. The reprint from Vera’s Ten-Year Report describing the project, originally published in 1972, is introduced by Jerome McElroy, executive director of the New York City Criminal Justice Agency, the current incarnation of the project. It is followed by a short piece from Jon Wool, director of Vera’s New Orleans Office, who describes the work there to enhance justice for that city’s pretrial population.

Although many officials are motivated to remedy the injustice of people who are sitting in jail not because they pose a threat to their community but because they cannot afford bail, a number of jurisdictions are interested in pretrial programs as a way to relieve pressure on their jails. Overcrowded conditions, tightening budgets, and the revolving jailhouse door have encouraged sheriffs and county leaders to seek other ways to manage their pretrial populations. The experiment that started in 1961 in New York City has proved durable: Today, 65 percent of defendants in New York City whose cases are not disposed of at arraignment are released on their own recognizance. Curtailing use of this pretrial “sentence” also has other implications; what the reprint points out is still true today—those detained pretrial are more likely to be convicted and more likely to receive longer sentences.

Whereas Vera got its start with adult offenders, the juvenile justice population also faces the prospect of sentencing before adjudication. Vera’s Center on Youth Justice devises responses to such challenges using the classic Vera tools of collaboration, research, and innovation. As recounted in the excerpt from “Juvenile Detention Reform in New York City: Measuring Risk Through Research,” Vera created an empirically based risk-assessment instrument to help judges make initial detention decisions. With employment of this tool, the use of detention (the equivalent of jail in the adult context) at arraignment has dropped 25 percent.

Vera was a pioneer in piloting and examining the different ways people could be safely and responsibly detained from the halls of justice or the walls of prison. Whether offered as a diversion before trial or an alternative to a prison or jail sentence, such approaches remain among the most compelling ways to achieve better outcomes, encourage greater individual accountability, and ensure that expensive prison and jail beds are reserved for those who most deserve it.

The Bowery Project is—in some ways—a relic of its time: The first annual report from 1969, part of which is reprinted in this issue, reads more like a novel than a professional evaluation (reflecting a time when business speak did not dominate the discourse); the word homeless appears in quotes and is defined for the benefit of the reader, and the image of derelict drunk men in hats and suits seems taken from a documentary on the Great Depression. Yet the Bowery Project—and the model of a sobriety center that it represents—remains equally relevant today as counties nationwide struggle with jail overcrowding partly caused by endless numbers of arrests for public-disturbance and public-intoxication offenses. Vera’s first foray into diversion programs retains the ability to instruct many years later.

In 1997, the New York City Council wanted to learn more about the outcomes of its alternative-to-incarceration efforts. They turned to Vera to conduct research on the full range of the city’s programs and participants. An excerpt from “Balancing Punishment and Treatment: Alternatives to Incarceration in New York City” is reprinted here. This report outlines the difficulties that plague so many alternative programs, including drug courts and other specialty courts, in bringing these endeavors to scale, ensuring that program eligibility is not too narrowly drawn, and developing approaches that are appropriate for the many identified needs of the offender population.

The judge, the prosecutor, and perhaps the public may feel a sense of completion once a convicted defendant receives a sentence in open court and is led away to prison. Many people, however, will face additional punishment once they start living behind those walls. The Commission on Safety and Abuse in America’s Prisons—which was created and staffed by Vera—studied the health and safety conditions of correctional facilities throughout the United States. Its final report, part of which is reprinted in this issue of FSR, helped focus national attention on conditions of imprisonment. The effort continued when Vera helped develop the standards and draft the National Prison Rape Elimination Commission’s final report, which summarizes Vera’s motivation to work in this area by stating that people confined in correctional facilities “still have the right to be treated in a manner consistent with basic human dignity, the right to public safety, and the right to justice if they become victims of crime.”
Years before the hunger strike at Pelican Bay State Prison in California in July 2011 brought attention to the widespread use of segregation—as isolation and solitary confinement are often known—Vera was studying and working in this area. The piece by Angela Browne and colleagues, “Prisons Within Prisons: The Use of Segregation in the United States,” describes Vera’s Segregation Reduction Project. The goals of the project include helping corrections departments safely reduce the number of prisoners held in segregation, improving conditions of such confinement, and enhancing programming for transitions back to the general prison population. True to Vera’s approach, the project has the potential to demonstrate its success and become a model for concerned correctional administrators and other officials around the country.

The next series of articles examines the impact of sentencing on families, victims, and the community. Despite the fact that these constituencies are sometimes ignored in sentencing decisions, they are affected in significant ways by such decisions and are emerging as louder voices in the criminal justice process. Danielle Sered, the director of Common Justice, Vera’s newest demonstration project, writes in her contribution to this issue that traditional sentencing is inadequate, unfulfilling, and lacks purpose for both offenders and victims alike. Common Justice offers the victim, perpetrator, family, and community members an opportunity to engage in participatory justice, in which a dialogue takes place and the parties themselves determine an appropriate response to the harm caused. Ms. Sered weaves together evidence from both research and personal tales to demonstrate the great potential of this project.

The final selection of articles in this issue touches on the myriad issues facing an offender when he or she returns to the community following a period of incarceration. The articles explore the difficulty of reentry and reveal the ongoing punishments that are imposed on an individual for years—even a lifetime—after a judicially imposed sentence is complete. In “The Unintended Sentence of Criminal Justice Debt,” the authors explain the burden of fines and fees, as well as explore a potential demonstration project that would retain the revenue-generating aspect of fees and fines while minimizing the unintended negative justice outcomes.

For some offenders, the consequence of a conviction is deportation—even for those who are longtime permanent residents of the United States. In “Do I Have to Learn What a Crime of Moral Turpitude Is?,” Kara Hartzler, who works with Vera’s Center on Immigration and Justice as a provider of legal services in Arizona, suggests ways in which Padilla v. Kentucky may help or hinder a person’s chances of understanding the risk of deportation when pleading guilty to even the most minor offenses. In “Is it Worth the Costs? Using Cost-Benefit Analysis to Minimize the Collateral Consequences of Convictions,” Valerie Levshin discusses the cost and benefits of these ongoing, often unintended consequences of a criminal sentence. Ms. Levshin provides the field with an introduction to some of Vera’s newest work in the area of cost-benefit analysis and how it can potentially ensure sentencing choices that not only make justice sense to the community but also make economic sense to governments.

The final piece in this issue is a tribute to Daniel J. Freed, a founder of FSR and a longtime trustee and friend of Vera. I believe it is fitting to conclude this issue of FSR, which focuses on sentencing, with personal reflections by Kate Stith, Nancy Gertner, and Sofia Yakren on a man who through his teaching, research, and writing—most especially about sentencing—did so much to ensure that justice indeed remained at the heart of the justice system. We at Vera and at FSR dedicate this issue to him.